No. 79-200

In the Supreme Court of the United States

OCTOBER TERM, 1978

PATRICIA R. HARRIS, [redacted] SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL.,
PETITIONERS

v.

ISLESBORO SCHOOL COMMITTEE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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PATRICIA R. HARRIS, ~~JOSEPH A. CALIFANO, JR.~~, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., PETITIONERS

v.

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The Solicitor General, on behalf of the Secretary of Health, Education, and Welfare and the other federal parties, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 593 F.2d 424. The opinion of the district court (App. D, *infra*) is reported at 449 F. Supp. 866.

JURISDICTION

The judgment of the court of appeals was entered on March 9, 1979 (App. B, *infra*). On May 30, 1979, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including August 6, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Sections 901(a) and 902 of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682, authorize the Department of Health, Education, and Welfare to issue regulations prohibiting sex discrimination in the employment practices of school districts and educational institutions receiving federal financial assistance.

STATUTES AND REGULATIONS INVOLVED

1. Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> **(1) Classes of educational institutions subject to prohibition**
>
> in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;
>
> **(2) Educational institutions commencing planned change in admissions**
>
> in regard to admissions to educational institutions, this section shall not apply (A) for one year

> from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later;
>
> **(3) Educational institutions of religious organizations with contrary religious tenets**
>
> this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;
>
> **(4) Educational institutions training individuals for military services or merchant marine**
>
> this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;
>
> **(5) Public educational institutions with traditional and continuing admissions policy**
>
> in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this action shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age:

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably

comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

2. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1682, provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for

hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

3. The regulations of the Department of Health, Education, and Welfare provide in pertinent part:

45 C.F.R. 86.51(a)(1):

> No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

45 C.F.R. 86.57(c):

> A recipient shall treat pregnancy, * * * termination of pregnancy, and recovery therefrom and any

> temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

STATEMENT

This case began as two consolidated suits, brought by the elected boards of several Maine public school districts, to enjoin regulations of the Department of Health, Education, and Welfare (HEW) prohibiting sex discrimination in the employment practices of those operating federally assisted education programs and activities.

The plaintiff school districts receive financial assistance from HEW in support of their educational programs, and they are therefore subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C 1681 *et seq.* (hereinafter "Title IX"), and to authorized regulations promulgated by HEW to effectuate those provisions.

To implement Section 901(a) of Title IX, 20 U.S.C. 1681(a), which provides that with certain enumerated exceptions, "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," HEW issued regulations that, *inter alia*, prohibit sex discrimination in the employment practices of federal education aid recipients. 45 C.F.R. 86.51 *et seq.*

During 1977 HEW received complaints about the pregnancy leave policies of the school districts, and following investigations, it notified each district that the district's teacher employment policy regarding preg-

nancy leave violated both Title IX and 45 C.F.R. 86.57(c), because the refusal to allow pregnant teachers to use sick leave for the period during which they are disabled by their condition is discriminatory in that it treats pregnancy differently from other temporary medical disabilities (App. D, *infra*, 17a). HEW requested that each school district take corrective measures; and, when no such measures were agreed to, it referred the matters to the appropriate office for administrative enforcement. In response, the districts instituted suits challenging HEW's authority to regulate employment under Title IX (*ibid.*).

Brunswick School Board filed suit in the United States District Court for the District of Maine on July 22, 1977, challenging HEW's authority to issue and enforce its employment practices regulations, 45 C.F.R. 86.51 *et seq.*, and seeking to enjoin enforcement of the pregnancy leave regulation, 45 C.F.R. 86.57(c) (A. 6–18).[1] Named as defendants were HEW and certain of its officials and the State of Maine and a Maine official (A. 1).[2] A similar suit filed thereafter by Islesboro School Committee and the boards of three other school districts was consolidated with the first (App. D, *infra*, 15a).[3]

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[1] "A." refers to the joint appendix filed in the court of appeals in the consolidated cases.

[2] The defendant HEW officials were the Secretary; John Bynoe, Director of HEW's Office for Civil Rights for Region I; and Maria C. Montalvo, Chief of the Elementary and Secondary Education Branch in the Region I office (A. 1). The defendant Maine official was the Maine Commissioner of Educational and Cultural Services (*ibid.*). The state defendants were included because a Maine statute requires the Commissioner to insure that federal or state funds distributed to school districts be spent "in compliance with" certain federal and state laws, including Title IX and pertinent regulations (App. D, *infra*, 17a–18a).

[3] The other plaintiffs were the Board of Directors of Maine School Administrative District No. 5, the Board of Directors of Maine School Administrative District No. 33, and the Winslow School Committee. The Secretary and HEW were the sole defendants.

2. On cross-motions for summary judgment the district court ruled for plaintiffs, declaring 45 C.F.R. 86.57(c) invalid and enjoining its enforcement against the school districts (App. D, *infra*, 32a). On the basis of its analysis of the language of Section 901 of Title IX, the legislative history—which the court stated was "not without some ambiguity" (App. D, *infra*, 22a)—and decisions of other federal district courts, the court held that "the statute does not cover the employment practices of educational institutions receiving federal funds, but rather is restricted in scope to a prohibition of sex discrimination against students and other direct beneficiaries of such federal assistance" (*id.* at 29a). The court acknowledged that faculty members might sometimes be direct beneficiaries of federal assistance, such as research grants, but it found that none of the teacher employees of the school districts was such a beneficiary (*id.* at 20a n.4).

3. The court of appeals affirmed, holding that HEW lacked authority under Title IX to issue regulations prohibiting sex discrimination against "employees *qua* employees (as opposed to their status as recipients of specialized federal funding for a special activity or research)" (App. A, *infra*, 4a). The court asserted that Section 901(a) of Title IX does not, by its terms, include employees and that none of the specific exemptions from its coverage (see pages 2–5, *supra*) mentions employment (App. A, *infra*, 3a–4a).

Acknowledging, however, that employment was not expressly excluded from coverage, the court examined the legislative history of Title IX (*id.* at 4a–8a). The court noted that the bill that became the Education Amendments of 1972 originally included sections amending both the Equal Pay Act, 29 U.S.C. 213(a),

and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, in ways that, *inter alia*, made them applicable to sex discrimination against teachers;[4] and it ~~court~~ concluded that comments of Senator Bayh—the bill's sponsor—on which HEW relied in part for its interpretation of Section 901 of Title IX were mere "lapses" in which references to employment discrimination were inadvertently linked to the portions of the bill that became 20 U.S.C. 1681-1682 (App. A, *infra*, 4a-7a).

The court also rejected an alternative argument by HEW that the regulations in question were authorized because Title IX, at the least, empowers HEW to regulate employment discrimination to the extent that it affects HEW-funded educational programs provided to students. The court acknowledged that "the basic premise might be correct," but it found no proven nexus between HEW's employment practices regulations and sex discrimination against students (App. A, *infra*, 11a).[5]

REASONS FOR GRANTING THE PETITION

Title IX of the Education Amendments of 1972, as HEW has consistently construed it, provides a significant statutory tool for discouraging sex discrimination against employees of institutions receiving federal aid for education programs and activities and ensuring that such institutions do not continue to receive federal funds while refusing to comply with the policy of non-

[4] See page 15, *infra*.

[5] Neither the court of appeals nor the district court reached an argument made by the *Islesboro* plaintiffs in the district court (A. 127-129), in reliance on this Court's decision in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), that the pregnancy leave regulation, 45 C.F.R. 86.57(c), is invalid because the practices it prohibits do not constitute discrimination on the basis of sex.

discrimination expressed by Congress in this and other statutes.[6] We submit that this construction is supported by both the language and the legislative history of Title IX and that review by this Court of the decision of the court of appeals invalidating regulations based on this construction is essential to resolving an uncertainty that has already severely disrupted HEW's enforcement program under Title IX.

1. We are advised that in a recent survey of complaints filed under Title IX with HEW's Office for Civil Rights, 507 complaints out of 912 pending during June 1979 (*i.e.* 55.6%) concerned employment discrimination. Because of the decision below and similar decisions of two other courts of appeals[7] and several district courts,[8] HEW is prevented from acting on many such complaints in the judicial districts concerned, and its

[6] Although individuals aggrieved by sex discrimination in employment may seek relief under other statutes, and although other federal agencies may bring suits to halt discrimination, HEW is required to continue to extend federal financial assistance regardless of whether such other actions are being taken. Title IX is the federal government's only remedy to insure that federal education aid is withdrawn from recipients who refuse to comply with the policy of nondiscrimination expressed by Congress.

[7] *Junior College District of St. Louis* v. *Califano*, 597 F.2d 119 (8th Cir. 1979), aff'g 455 F. Supp. 1212 (E.D. Mo. 1978); *Romeo Community Schools* v. *HEW*, Nos. 77-1691, 77-1692 (6th Cir. June 20, 1979), aff'g 438 F. Supp. 1021 (E.D. Mich. 1977). We are filing a petition in *Junior College District of St. Louis* concurrently with the instant petition.

[8] *Seattle University* v. *HEW*, No. C-77-631S (W.D. Wash. Jan. 20, 1978), appeal pending, No.78-1746 (9th Cir.); *Dougherty County School System* v. *Califano*, C.A. No. 78-30-ALB (M.D. Ga. Aug. 22, 1978), appeal pending, No. 78-3384 (5th Cir.); *Board of Education of the Bowling Green City School District* v. *HEW*, No. C-78-177 (N.D. Ohio March 14, 1979), appeal pending, No. 79-3420 (6th Cir.); *University of Toledo* v. *HEW*, 464 F. Supp. 693 (N.D. Ohio 1979), appeal pending, No.

authority to do so is in doubt throughout the nation. It has, accordingly, found it necessary to suspend normal enforcement of its employment practices regulations pending a definitive resolution of its authority to enforce the regulations.[9] Because of the severe disruption in the administrative enforcement of Title IX caused by the decision below and others like it, we submit that review by this Court is warranted now despite the absence of a circuit conflict.[10]

2. Section 901(a), of Title IX, 20 U.S.C. 1681(a), provides that:

> [no] person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

The statute expressly prohibits three types of discrimination against all persons, *i.e.*, no person may "be

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79-3270 (6th Cir.); *North Haven Board of Education* v. *Califano*, Civ. No. N-78-165 (D. Conn. Apr. 26, 1979), appeal pending, No. 79-6136 (2d Cir.); *Auburn School District* v. *HEW*, No. 78-154-D (D. N.H. May 14, 1979), appeal pending, No. 79-1261 (1st Cir.).

[9]We are advised that HEW's Office for Civil Rights has instructed its regional offices to proceed only in those cases in which they can prove either (1) that the principal purpose of the federal funds in question is to provide employment or (2) that the allegedly discriminatory employment practice may have a discriminatory impact upon students or other direct beneficiaries of the aid. The first category of cases would come within Section 901 of Title IX as construed by the courts below; the court of appeals expressly left open the question whether the second category of cases is covered (App. A, *infra*, 11a).

[10]The substantiality of the question is indicated by the fact that in *Junior College District of St. Louis* v. *Califano*, *supra*, petitioners sought rehearing *en banc* and it was denied by an equally divided court, Judges Lay, Heany, Henley, and McMillian dissenting.

excluded from participation in, be denied the benefits of, or be subjected to discrimination under" federally assisted education programs or activities. The decision of the court below unduly focuses on only one of those prohibitions—nondiscrimination in the disbursement of federal benefits. The court's conclusion that the language of the statute on its face "is aimed at the beneficiaries of the federal monies" (App. A, *infra*, 3a), defined by the court as students attending the educational institution or teachers directly receiving federally funded research grants, gives insufficient weight to the two other prohibitions of the statute. Employees of an educational institution are as susceptible of being "excluded from participation in" federally assisted programs or "subjected to discrimination under" such programs as are the students in those programs. For example, if the respondent school districts refused to hire teachers of one sex to teach in particular federally funded programs (regardless of the source of funding for the particular teacher's salary), such persons would "be excluded from participation in" those programs "on the basis of sex." Likewise, if in such federally assisted programs men and women were compensated at unequal rates of pay based on their sex, such persons would "be subjected to discrimination under" those programs. The decisions below prevent HEW from taking steps to assure that such types of discrimination do not occur, even though they come within the plain language of the statute.

No language in any other part of Title IX states either expressly or implicitly that employees who are subjected to discrimination on the basis of sex as defined in Section 901(a) are to be excluded from the coverage of the regulations authorized by Section 902. The fact, relied on by the courts below (App. A, *infra*, 3a-4a; App. D, *infra*, 21a-22a), that none of the Section 901 exemptions addresses employment may more readily be taken to mean that no exemptions for employ-

ment discrimination were intended than that employment discrimination was not covered by Section 901. Thus construed, Section 901 in its entirety simply reflects the intention of the Senate sponsor of Title IX that, while there were exceptions to coverage in other areas, "[i]n the area of employment, we permit no exceptions * * *." 118 Cong. Rec. 5812 (1972) (remarks of Senator Bayh). As our discussion of the legislative history below indicates (pages 18–19, *infra*), a provision specifically prohibiting agencies from taking action with respect to any employment practice of a federal aid recipient unless a primary objective of the aid is to provide employment was proposed by the House of Representatives and deleted in the conference committee. Title IX as it emerged from that committee unambiguously prohibits sex discrimination against employees in education programs and activities receiving federal aid without regard to the primary objective of the aid, and it accordingly authorizes HEW to issue and enforce regulations effectuating that prohibition.

3. In enacting Title IX of the Education Amendments of 1972, Congress intended to address comprehensively the "persistent patterns of discrimination against women in the academic world." 118 Cong. Rec. 5804 (1972) (remarks of Senator Bayh). One of the specific targets of this legislation was discrimination against "those women who choose to make education their life work." *Id.* at 5804-5805. Senator Bayh, in introducing the amendment that became Title IX,[11] pointed to a number of areas in which women receive unequal treatment in employment by educational institutions: discrimination in hiring, fewer opportunities for advancement, preference for men in administrative posi-

[11] The legislation introduced by Senator Bayh, designated "Amendment 874," was offered as an amendment to S. 659, a bill to amend the Higher Education Act of 1965 and other acts concerned with education. 118 Cong. Rec. 5791, 5802–5803 (1972).

tions, and denial of equal pay for equal work. *Id.* at 5805. The aim of Senator Bayh's amendment was "to expand some of [the] basic civil rights and labor laws" to prohibit [this documented] discrimination against women." *Id.* at 5807.

Senator Bayh's amendment included the prohibition of sex discrimination and related enforcement procedures which were the bases for Sections 901 and 902 of Title IX, now codified at 20 U.S.C. 1681–1682; a provision amending a section of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, so as to make Title VII applicable to employees of public educational institutions, who were originally excluded; and a provision amending the Equal Pay Act, 29 U.S.C. 213(a), so as to make it applicable to administrative, executive, and professional workers. 118 Cong. Rec. 5803, 5807 (1972).[12] The conclusion of the courts below that Senator Bayh's amendment dealt with employment discrimination only through the amendments to Title VII and the Equal Pay Act is contradicted by the explanations given by Senator Bayh himself in introducing his amendment and in the ensuing debate.

Perhaps the clearest expression of the intent of the amendment came in the Senator's summary of what his amendment was designed to accomplish and how it would do this. *Id.* at 5806–5808. The Senator broke his summary down according to what he termed different "portion[s]" of the amendment. His explanations of the first two such portions appear in the Congressional Record under the headings "A. Prohibition of Sex Dis-

[12] Section 1009 of Senator Bayh's amendment, amending the Equal Pay Act, became Section 906(b)(1) of Title IX, Pub. L. No. 92–318, 86 Stat. 375. The amendment to Title VII of the Civil Rights Act of 1964 was ultimately deleted because, just before final passage, a similar amendment was enacted as part of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, 86 Stat. 103, amending 42 U.S.C. 2000e(a).

crimination in Federally Funded Education Programs" and "B. Prohibition of Education-Related Employment Discrimination." *Id.* at 5807. In the first part of his summary he describes the basic prohibition against sex discrimination and the "enforcement provisions which generally parallel the provisions of title VI [of the Civil Rights Act of 1964]" (*ibid.*); and in the second part he describes the amendments to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. Despite the contrary inference that might be drawn from the headings alone, Senator Bayh's description of the first portion of his amendment shows that Section 901 of Title IX was intended to cover discrimination in employment practices by educational institutions receiving federal support for their programs.[13] Thus, after describing the mechanics of the amendment (the authority conferred on agencies like HEW to issue regulations, to permit certain types of "differential treatment" of students based on sex, and to penalize violations of regulations by fund termination), the Senator goes on to define the types of sex discrimination subject to these procedures (*ibid.*):

> This portion of the amendment covers discrimination in all areas where abuse has been mentioned—employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth. The provisions have been tested under title VI of the 1964 Civil Rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility.

[13] Part "A" of the summary begins with the statement, "Central to my amendment are sections 1001–1005, which would prohibit discrimination on the basis of sex in federally funded education programs." *Id.* at 5807. The reference to "sections 1001–1005" is evidently a misprint for "sections 1001–1004," since Section 1005 is the amendment to Title VII, which is not limited to "federally funded education programs" and which, as noted,

Because that description of the scope of the amendment is obviously part of a prepared statement rather than off-the-cuff remarks uttered in the heat of debate, it shows clearly that in the subsequent colloquy between Senator Bayh and Senator Pell concerning Section 1001(a) and (b) of Senator Bayh's amendment (the predecessors of 20 U.S.C. 1681(a) and (c), respectively), Senator Bayh means exactly what he says concerning the scope of Section 1001 (118 Cong. Rec. 5812):

> Mr. PELL. * * * Sections 1001(a) and (b) include all educational institutions which receive Federal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded * * * their admissions practices. Does the same exclusion apply * * * at the elementary and secondary level?
>
> Mr. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.

These remarks by Senator Bayh, together with his summary, quoted above, of the scope of the first "por-

is discussed in Part B of the summary, along with the Equal Pay Act amendment. The error may reflect a confusion with the numbering of similar provisions in Title X of the original House bill, H.R. 7248, which included an extra section. H.R. Rep. No. 92–554, 92d Cong., 1st Sess. 108 (1971); 117 Cong. Rec. 39098–39099 (1971). The difference in numbering between Senator Bayh's amendment and the provisions ultimately enacted is attributable to the fact that Senator Bayh's amendment was originally planned as Title X of S. 659. 118 Cong. Rec. 5791, 5803 (1972) (see note 11, supra).

tion" of his amendment, cannot be dismissed—in the words of the court below—as "occasional lapses" reflecting "the imprecision of oral discussion" (App. A, *infra*, 7a). As the remarks of the sponsor of language ultimately enacted, they are an authoritative guide to its construction. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394–395 (1951); *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964).[14]

Finally, the construction of Section 901 of Title IX to cover discrimination in employment practices is supported by the rejection by the conference committee of a provision excluding such practices from the types of discrimination for which the fund termination mechanism is an available sanction. The House version had included the following provision, parallel to Section 604 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d–3 (117 Cong. Rec. 39365 (1971)):[15]

> SEC. 904. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

[14]The court below (App. A, *infra*, 6a–7a), commenting on a very brief summary Senator Bayh asked to have printed in the record (118 Cong. Rec. 5808 (1972)), concluded that the section titles "*Basic Prohibition*," for what became Section 901 of Title IX, and "*Employment Discrimination*," for the section that would amend Title VII of the Civil Rights Act of 1964, indicated that Section 901 was not intended to cover employment discrimination. This is not a necessary inference, and, more importantly, Senator Bayh's more extended description of his amendment discussed above shows it is an incorrect one.

[15]The bill (H.R. 7248) as introduced in the House included this same provision, but it was numbered Sec. 1004, because the sex discrimination prohibitions were originally to be Title X rather than Title IX. 117 Cong. Rec. 39099 (1971).

The Conference Report notes, but gives no explanation for, the deletion of this provision (H.R. Rep. No. 92–1085, 92d Cong., 2d Sess. 221 (1972)). In view of the fact, however, that the counterpart in Title VI of the 1964 Act was added to give precise definition to the intended scope of the basic prohibition in Section 601 of that title, 42 U.S.C. 2000d (and therefore to foreclose courts from construing Section 601 to apply to employment discrimination other than the limited category indicated in Section 604) (see 110 Cong. Rec. 12720 (1964) (remarks of Senator Humphrey)), it is reasonable to suppose that Congress intended to leave open for Section 901 of Title IX the interpretation it foreclosed in Title VI. The suggestion by the courts below (App. A, *infra*, 8a; App. D, *infra*, 24a–25a) that the deletion was made merely to avoid the inconsistency of excluding coverage of employment practices in a title that included amendments expanding the coverage of the Equal Pay Act and Title VII of the Civil Rights Act of 1964 does not meet the argument that Section 904 could easily have been redrafted to avoid the inconsistency.[16]

4. The courts below appear to have strained to find an ambiguity not present on the face of the statute.

[16]Because the deleted language refers specifically to federal financial assistance, it would not, on its face, be applicable to the Title VII and Equal Pay Act amendments. A minor redrafting would thus have cured any inconsistency, *e.g.*,

> [n]othing contained in this title shall be construed to authorize action under *sections 901 and 902* * * * with respect to any employment practice.

An amendment proposing language to the same effect was introduced in 1975 by an opponent of employment coverage, but it was never reported out of committee. S. 2146, 94th Cong., 1st Sess., 121 Cong. Rec. 23845-23847 (1975).

Then, referring to the legislative history to resolve this created doubt about the meaning of Section 901, they have refused to credit any of the portions of that legislative history that support HEW's interpretation. In so doing, the courts have ignored two fundamental principles for construing statutes and administrative regulations.

The first is that the contemporaneous construction of a statute by an agency "charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" will not be overturned except for "very cogent reasons." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). This Court has held that such a construction should normally be accorded substantial deference. *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433–434 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

In the present case, HEW has, pursuant to statutory command (20 U.S.C. 1682), issued regulations to effectuate what it takes to be the purposes of Section 901 of Title IX, 20 U.S.C. 1681; its regulations have been approved by the President; and they have lain before Congress without a vote of disapproval. It is true that the failure of Congress to disapprove the regulations may not be construed as congressional approval (see 20 U.S.C. 1232(d)(1)). Nevertheless, it is not insignificant that since the time that HEW published its regulations for comment, including the employment practices regulations at issue here (39 Fed. Reg. 22228, 22236–22238 (1974)), Congress has twice amended 20 U.S.C. 1681 without adding any provision that would invalidate the employment practices regulations (88 Stat. 1862 (1974); 90 Stat. 2234 (1976)); and the second of those amendments was passed after the regulations had been issued in final form (40 Fed. Reg. 24128, 24143–24144 (1975)) and reviewed by Congress (*Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975)). As this Court has recently observed, while it is "not always * * * realistic to infer approval of a judicial or administrati[ve] interpretation from congressional silence alone," an agency's construction of a statute has considerable force if it has been brought to the attention of Congress and Congress has "not sought to alter that interpretation although it has amended the statute in other respects * * *." *United States* v. *Rutherford*, No. 78–605 (June 18, 1979), slip op. 9 n.10. See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

The decisions below also violate the principle that remedial civil rights legislation should be broadly interpreted in order to effectuate its purposes. *Daniel* v. *Paul*, 395 U.S. 298, 307–308 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968). The fact that employment coverage under Section 901 of Title IX overlaps the coverage of other legislation aimed at eliminating sex discrimination in employment does not nullify this general principle of construction. Although the courts may disagree with Congress' choice to disperse among several statutes and agencies the authority to combat such discrimination, they are not free to disregard and frustrate that plan as they have done here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 1979

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 78-1302

ISLESBORO SCHOOL COMMITTEE, ET AL.,
PLAINTIFFS-APPELLEES,

v.

JOSEPH A. CALIFANO, JR., ET AL.,
DEFENDANTS-APPELLANTS.

No. 78-1304

BRUNSWICK SCHOOL BOARD,
PLAINTIFF-APPELLEE,

v.

JOSEPH A. CALIFANO, JR., ET AL.,
DEFENDANTS-APPELLANTS,

v.

H. SAWIN MILLETT, JR., ET AL.,
DEFENDANTS-APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. EDWARD T. GIGNOUX, *U.S. District Judge*]

Before COFFIN, *Chief Judge*, CAMPBELL AND BOWNES,
Circuit Judges.

March 9, 1979

BOWNES, *Circuit Judge*. Congress passed the Education Amendments of 1972 to proscribe discrimination based on sex under any educational program activity receiving federal financial assistance.

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

20 U.S.C. § 1681(a). The Department of Health, Education and Welfare (HEW), pursuant to 20 U.S.C. § 1682, issued regulations, 45 C.F.R. §§ 86.1–86.71, designed to effectuate the mandate of 20 U.S.C. § 1681, or Title IX § 901, as it is also called. These were addressed in part to the employment practices of educational institutions. The issue before us is whether HEW exceeded its authority by issuing such employment-related regulations.

Plaintiffs, comprising several school districts in Maine, were alleged to discriminate in their maternity leave employment policies by treating pregnancy differently from other temporary disabilities. This, HEW asserted, violated 45 C.F.R. Part 86, specifically section 86.57(c). The period of noncompliance was allegedly from June, 1975, to July, 1977. The regulation in controversy reads as follows:

> *Pregnancy as a temporary disability.*
>
> A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under

> any fringe benefit offered to employees by virtue of employment.

45 C.F.R. § 86.57(c). Plaintiffs were threatened with a cutoff in federal and state funds.[1] The school districts filed suit requesting declaratory and injunctive relief: they requested that HEW be enjoined from enforcing the regulation on the grounds that it was promulgated in excess of the authority conferred by statute. The district court, after a hearing on cross-motions for summary judgment, found 45 C.F.R. § 86.57(c) invalid and enjoined its enforcement and the cutoff of state or federal funding for noncompliance. The trial court reasoned that neither the plain language of section 901, 20 U.S.C. § 1681, nor its legislative history embraced employees and that they were, therefore, not entitled to its protection. The court's opinion is reported at 449 F. Supp. 866. Both HEW and the State of Maine appeal from the decision.

We begin with an examination of the language of the statute to determine whether it can reasonably be construed to include the grant of authority under which HEW promulgated the regulation in question. The language of section 901, 20 U.S.C. § 1681(a), on its face, is aimed at the beneficiaries of the federal monies, *i.e.*, either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government. The section does not include employees within its terms. This reading of the plain language of the statute is buttressed by an examination of the specific exemptions mentioned in the statute. They all deal with student admissions or activities of a student nature, *e.g.*, "beauty"

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[1] Plaintiffs were also threatened with a violation of Maine law which makes noncompliance with the federal scheme a state violation as well. State funds could also be withdrawn. 20 M.R.S.A. §§ 6, 3755 (Supp. 1977).

pageants, social fraternities and sororities, Boys State conference, Girls Nation conference, father-son and mother-daughter activities. Nothing in the statute suggests that it should be construed to extend to employees *qua* employees (as opposed to their status as recipients of specialized federal funding for a special activity or research).

Since, however, employees are not *expressly* eliminated from the statute's coverage, and in light of HEW's st[illegible]ng urging that employees should be construed as coming within the coverage of the statute, we examine the legislative history for any illumination it can shed. Senator Bayh introduced the legislation which was later to become 20 U.S.C. § 1681. The bill comprised several sections; what is now known as Title IX, 20 U.S.C. §§ 1681 & 1682, was among them. Another section was designed to amend the Equal Pay Act of the Fair Labor Standards Act, 29 U.S.C. § 213(a), by extending coverage to professional, executive, or administrative female employees. Also included in Senator Bayh's proposed legislation was an amendment to Title VII, 42 U.S.C. § 2000e, which would have extended coverage to teachers in both private and public institutions. These latter two points are of particular importance as HEW relies in its brief upon several comments from Senator Bayh referring to the effect his amendment will have, not only on students, but on conditions of faculty employment. HEW points to the following dialogue to fortify its position that Title IX intended its coverage to extend to employees of educational institutions.

> Mr. PELL. . . . Sections 1011(a) and (b) [these sections became, in large measure, 20 U.S.C. § 1681(a) and (c)] include all educational institutions which receive Federal Assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded from coverage their admissions practices. Does the same exclusion apply to non-

> public institutions at the elementary and secondary level?
>
> Mr. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.
>
> In the area of employment, we permit no exceptions. In the area of services, once a student is accepted within an institution, we permit no exceptions. The Senator from Rhode Island asked about admissions policies of private secondary and primary schools. They would be excepted.

118 Cong. Rec. 5812 (1972). The Department of Health, Education and Welfare argues that since Senator Pell had identified his question as relating to what is now 20 U.S.C. § 1681, Senator Bayh's response, by including comments regarding employment practices, thereby proves that Title IX encompasses employment practices in addition to discriminatory practices aimed at students. We cannot agree. A fair reading both of the colloquy above, as well as the discussion immediately preceding and following the above-quoted passage, indicates that Senator Bayh divided his analysis into three sections, two of which were specifically aimed at students (admissions and services), the third at employees (employment). While Senator Bayh's response was more extended than it needed to be for a direct answer to Senator Pell's question, we think HEW's reading is strained. We think this particularly in light of the fact that the discussion was an oral one and thus not as precise as a response in written form, and in view of other parts of the discussion on the amendment, wherein Senator Bayh continuously broke down the amendment

into separate categories, certain of them dealing only with students (Title IX) and others dealing with employees (Title VII and the Equal Pay Act).[2]

Frequently, during the course of the debates, Senator Bayh identified the employment sections of his bill as amendments to Title VII and to the Equal Pay Act.

> Title VII of the 1964 Civil Rights Act has been extremely effective in helping to eliminate sex discrimination in employment. Unfortunately it has been of no use in the education field, because the title by its terms exempts from its protection employees of educational institutions who "perform work connected with the educational activities" of the institution. Therefore, the second major portion of this amendment would apply title VII's widely recognized standards of equality of employment opportunity to educational institutions.
>
> In addition, to make sure that both men and women employees receive equal pay for equal work, my amendment would extend the Equal Pay Act of 1963 to include administrative, executive, and professional workers, including teachers, all of whom are presently excluded.

Id. at 5807. The sections which eventually became Title IX were described in terms of their effects on the beneficiaries of federal funds, *i.e.*, the students. *Ibid.*

The summary of the bill which was read into the Congressional Record included the following categories: "Basic Prohibition" (dealing with admissions to educational institutions); "Enforcement and Related Provisions" (each agency extending federal financial assistance empowered to issue regulations and insure com-

[2]The proposed amendment to Title VII was ultimately dropped prior to passage, since an amendment to the same effect had recently been enacted as part of the Equal Employment Act of 1972, Pub.L. No. 92-261 § 2(1), 86 Stat. 103 § 2, 42 U.S.C. § 2000e(a).

pliance via termination in funding); "Employment" (Title VII amended to include public and private educational institutions within the statute's coverage); "Equal Pay for Professional Women" (Fair Labor Standards Act amended to eliminate exemption for executive, administrative or professional employees). *Id.* at 5808. This breakdown demonstrates that the basic provisions dealing with admissions and services at educational institutions, now embodied in Title IX, were separate and distinct from the provisions amending Title VII and the Equal Pay Act, both of which dealt with employment.

While it is true that there were occasional lapses during the discussions, wherein one of the senators would telescope the sections, thereby suggesting that employment was to be covered under the basic provisions of Title IX, a careful examination of the debates had led us to conclude that these were the product of the imprecision of oral discussion rather than a reflection that the Act intended section 901 of Title IX to embrace prohibitions against sex discrimination in employment. This was reserved for the amended Title VII and Equal Pay Act.

In its discussion of the legislative history, HEW points to the failure of Congress to adopt a section which would have paralleled section 604 of Title VI, 42 U.S.C. § 2000d-3. The deleted section read:

> Sec. 1004. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except for a primary objective of the Federal financial assistance is to provide employment.

H.R. 7248, 92d Cong., 1st Sess. § 1004 (1971). *See also* [1972] U.S. Code Cong. & Adm. News 2462, 2566. Section 1004 was contained in the House version of the bill and was deleted from the Act as finally enacted. *See id.* at 2671-72. HEW argues that by eliminating this sec-

tion, Congress thereby intended to cover employment practices under section 901 of Title IX. This reasoning is not persuasive. The above-cited section would have been inconsistent with other sections of the Act then being enacted, namely the amendments to Title VII and the Equal Pay Act, which authorized both the Equal Employment Opportunity Commission and the Labor Department (the agencies responsible, respectively, for the enforcement of Title VII and the Equal Pay Act) to take such action.[3]

Our holding is the first on this issue by a court of appeals. Several district courts also have concluded, however, that HEW was without authority to issue the employment-related regulations found at 45 C.F.R. Part 86. *Romeo Community Schools* v. *HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977), *apeal ending* [*sic*], No. 77-1691 (6th Cir. 1978) (the regulations were not in furtherance of the legislative purpose and, therefore, not authorized); *University of Toledo* v. *HEW*, No. C 77-235 (N.D. Ohio Jan. 31, 1979) (regulations are void and unenforceable because not authorized by section 1681); *Junior College District of St. Louis, St. Louis County,*

[3]HEW also argues that Congress's failure to disapprove the regulations found at 45 C.F.R. Part 86 should be construed as approval. By statute, the regulations become effective forty-five days following their transmission to Congress unless Congress affirmatively, by concurrent resolution, acts to disapprove them. 20 U.S.C. § 1232(d)(1), (f). Since Congress had the opportunity to disapprove the regulations, HEW argues that the failure to do so is strong evidence in favor of their propriety. We disagree. Congressional inaction should not lightly be construed as approval. This was underscored by the passage, five months following the transmission of the regulations here at issue, of an amendment providing that the failure of Congress to disapprove a final regulation should be construed neither as approval of the regulation nor as a congressional finding of consistency with the act granting authority to promulgate the regulation. Pub.L.No. 94-142 § 7(a)(1),(b), 89 Stat. 796 (1975) (codified at 20 U.S.C. § 1232(d)(1)).

Mo. v. *Califano*, No. 78-319 C (3) (E.D. Mo. Sept. 20, 1978) (20 U.S.C. § 1681 applies only to students and other direct beneficiaries of federal financial assistance, not to employees; the regulations are, therefore, not authorized); *Dougherty County School System* v. *Califano*, Civ. Action No. 78-30-ALB (N.D. Ga. Aug. 22, 1978) (Title IX does not authorize HEW to promulgate regulations relating to employment); *Seattle University* v. *HEW*, No. C77-631S (W.D. Wash. Jan. 3, 1978) (regulations are overbroad and exceed the scope of authority granted to HEW under Title IX). *Cf. Board of Educ. of Bowling Green City School District* v. *HEW*, No. C78-177 (N.D. Ohio May 5, 1978) (plaintiff shows likelihood of prevailing on issue that 45 C.F.R. Part 86 is not authorized by statute).

The Department of Health, Education and Welfare points to two district court opinions in support of its position. *Piascik* v. *Cleveland Museum of Art*, 426 F. Supp. 779 (N.D. Ohio 1976), is cited for the proposition that 20 U.S.C. § 1681(a) encompasses employment discrimination. In that case, plaintiff brought suit for employment discrimination, premising her cause of action on violations of 42 U.S.C. §§ 2000e *et seq.* and 20 U.S.C. § 1681(a). The court, before granting summary judgment for defendant, commented in a footnote[4] on the applicability of 20 U.S.C. § 1681. *Id.* at 780-81 n.1. The tenor of the comment is somewhat ambivalent. The focus of the court's attention was whether a private cause of action was implied in 20 U.S.C. § 1681(a) rather than whether that statute properly extended to

[4]While it may appear to be a minor matter, we caution the Department of Health, Education and Welfare that it does not indicate that the passage it quotes from the *Piascik* decision, at 18 of its brief, is from a footnote in *Piascik*. We urge the Department to exercise more care in its citations. The fact that the court addresses the applicability of 20 U.S.C. § 1681(a) only by way of a footnote has considerable bearing on the proper use of that case as precedent for the proposition advanced by HEW.

discrimination against employees. The court adverted to the fact that 20 U.S.C. § 1681(a) formed part of a legislative package that included an amendment to Title VII. The court also stated: "Without recognition of a private cause of action under § 1681(a), individual litigants who suffered from *non-employment* related sex discrimination which violated the express prohibitions of § 1681(a), would be left with no remedy for the personal injury which they suffered to their education." *Ibid.* (emphasis added). Within the same footnote, however, the court used language which could be construed to support a finding that section 1681(a) does extend to employment related discrimination. To the extent that *Piascik* stands for the proposition that section 1681 embraces sex discrimination in employment, we do not find it persuasive. We remain unconvinced, however, that it stands squarely for that proposition.

The other case cited by HEW is *United States* v. *City of Chicago*, 395 F. Supp. 329 (N.D.Ill. 1975), *aff'd mem.*, 525 F.2d 695 (7th Cir. 1975). That case involved charges of discrimination by the police department in violation of 31 U.S.C. §§ 1221 *et seq.* (revenue sharing). The court construed language in 31 U.S.C. § 1242(a), which is parallel to that of 20 U.S.C. § 1681(a), as not posing a bar to suit brought by policemen for employment discrimination in hiring and promotion policies and practices. 395 F. Supp. at 342–44. HEW reasons that this, accompanied by the court's comments stating that Title VI did not bar the suit, supports its reading that 20 U.S.C. § 1681 extends to employment discrimination in educational institutions. We disagree. The State and Local Assistance Act of 1972, 31 U.S.C. §§ 1221 *et seq.*, embodies an entirely different legislative scheme from the Education Act and its Amendments, 42 U.S.C. §§ 2000c, 2000d, and 20 U.S.C. §§ 1681 *et seq.* Under the revenue sharing program, the direct beneficiaries are the *departments*, *e.g.*, police, fire, etc., receiving the funds. Those seeking to participate in or secure the benefits of the police department are

the employees and potential employees. Such is not the case with employees at educational institutions receiving federal funds (except in the situation where the teacher or faculty member is being funded under a federal grant of some sort), where the funds are intended to benefit the *students*, for, *e.g.*, free books, educational services, etc. We do not, therefore, read *United States* v. *City of Chicago* as addressing the question we face here.

The last lob in HEW's volley is that employment-related discrimination is proscribed under 20 U.S.C. § 1681 when that discrimination infects the beneficiaries of the programs, *i.e.*, the students. This "infection theory," as it is called, has been approved where it has been shown that eliminating discrimination against students is impossible in the absence of eliminating discrimination against faculty. *United States* v. *Jefferson County Bd. of Educ.*, 372 F.2d 836, 884–86 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir.), *cert. denied sub nom. Board of Educ. of City of Bessemer*, 389 U.S. 840 (1967). *See also Board of Public Instruction of Taylor County, Florida* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969). While the basic premise might be correct, that does not adequately underpin a grant of authority to HEW to promulgate broad-ranging regulations canvassing employment-related discrimination.[5] A nexus between the discrimination against employees and its effect on students must first be shown.

Before concluding, we take this occasion to observe that the question we herein resolve is of largely academic interest (albeit not to the specific litigants here). On October 31, 1978, Congress amended Title VII by adding a prohibition against the disparate treatment of

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[5] We also note that HEW did not allege in the court below that the pregnancy leave policies of the plaintiffs entailed discrimination against students. There thus seems to be no factual basis for the assertion of the infection theory to support the regulation here challenged.

pregnancy as a disability. Pub.L.No. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k). This legislation was passed to overturn the Supreme Court's holding to the contrary in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). S.Rep.No. 95-331, 95th Cong., 1st Sess. 2-3 (1978). Therefore, plaintiffs' school districts disparate treatment of pregnancy as a disability would now be susceptible to challenge as violative of Title VII.[6]

Affirmed.

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[6]The Maine Supreme Judicial Court has recently held that, pursuant to a state statute, 20 M.R.S.A. § 1951, pregnancy must be treated as any other temporary medical disability for which certified teachers are entitled to take sick leave as a mandatory benefit. *Murray* v. *Waterville Bd. of Educ.*, 390 A.2d 516, 519 (Me. 1978). *See also Millinocket School Committee* v. *Millinocket Teachers Assn.*, 390 A.2d 1106 (Me. 1978). The retroactive effect, if there be any, of this ruling is uncertain. The coverage would also seemingly, by virtue of the statute's language, be limited solely to certified teachers and would not extend to other female employees, *e.g.*, administrative, executive, secretarial, janatorial.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1302.

ISLEBORO SCHOOL COMMITTEE, ET AL.,
PLAINTIFFS, APPELLEES,

v.

JOSEPH A. CALIFANO, JR., ETC., ET AL.,
DEFENDANTS, APPELLANTS.

JUDGMENT

Entered March 9, 1979

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ Dana H. Gallup
Clerk.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 78-1304.

BRUNSWICK SCHOOL BOARD,
PLAINTIFF, APPELLEE,

v.

JOSEPH A. CALIFANO, JR., ETC., ET AL.,
DEFENDANTS, APPELLANTS,

and

H. SAWIN MELLETT, JR., ET AL.,
DEFENDANTS, APPELLEES.

JUDGMENT

Entered March 9, 1979

This cause came on to be heard on appeal from the United States District Court for the District of Maine, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

/s/ Dana H. Gallup
Clerk.

APPENDIX D

BRUNSWICK SCHOOL BOARD,
PLAINTIFF,

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL.,
DEFENDANTS.

ISLESBORO SCHOOL COMMITTEE ET AL.,
PLAINTIFFS,

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION AND WELFARE, ET AL.,
DEFENDANTS.

CIV. NOS. 77-168 SD and 78-10 SD.

UNITED STATES DISTRICT COURT,
D. MAINE, S.D.

April 13, 1978.

OPINION AND ORDER

GIGNOUX, District Judge.

The two cases presently before the Court raise similar questions of law and have been consolidated for purposes of briefing and argument.

In Civil No. 77-168-SD, plaintiff Brunswick School Board seeks declaratory and injunctive relief against the Secretary of Health, Education and Welfare ("HEW"), the Maine Commissioner of Educational and Cultural Services and the State of Maine. In Civil No. 78-10-SD, plaintiffs Islesboro School Committee, Board of Directors of Maine School Administrative District No. 5, Board of Directors of Maine School Administrative District No. 33 and Winslow School Committee seek similar relief against HEW but have not joined as defendants the Maine Commissioner or the State of

Maine. By leave of Court, the National Education Association, the Maine Teachers Association and the Brunswick Teachers Association have filed briefs and submitted oral argument, as amici curiae, in Civil No. 77-168-SD, supporting the position of the defendants.

Plaintiffs in both actions challenge the validity of an employment practices regulation, 45 C.F.R. § 86.57(c), promulgated by HEW pursuant to Title IX of the Education Amendments of 1972, 86 Stat. 373, as amended 88 Stat. 1862 (1974), 90 Stat. 2234 (1976), 20 U.S.C. § 1681 *et seq.* ("Title IX").[1] The regulation in question requires the recipients of federal educational assistance funds to treat pregnancy equally with other temporary disabilities for all job related purposes. Currently before the Court are plaintiffs' motions for summary judgment and defendants' cross-motions to dismiss or, in the alternative, for summary judgment. The issues have been thoroughly briefed and fully argued.

The threshold question which the Court must decide is whether § 901 of Title IX, 20 U.S.C. § 1681, prohibits sex discrimination in employment by recipients of federal educational funds or is limited to a prohibition of sex discrimination against students and other direct beneficiaries of such federal aid. Because the Court is persuaded that the statutory language and the legislative history of § 901, as well as recent case law, establish that § 901 is so limited, and hence that HEW had no power to promulgate 45 C.F.R. § 86.57(c), the Court need not reach other issues raised by the parties.

I.

The facts in each case are closely related and are without dispute. Plaintiffs are duly elected school

[1] Jurisdiction of the actions against HEW is asserted under 5 U.S.C. § 701 *et seq.*, and 28 U.S.C. §§ 1331, 1361, 2201 and 2202. Jurisdiction of the actions against the state defendants is predicated upon the doctrine of pendent jurisdiction.

boards charged with the responsibility for operating the public schools within the municipalities or school administrative districts which they serve. All of the plaintiffs receive federal educational assistance funds and thus are subject to Title IX and to 45 C.F.R. § 86.57(c). During 1977 each of the plaintiff school boards was notified by the Office of Civil Rights, Region I, HEW, of a complaint received by HEW which alleged sex discrimination in the school board's maternity leave policy for teacher employees. Following an investigation of the complaint, HEW informed the school board in question that its teacher employment policy regarding maternity leave violates Title IX and 45 C.F.R. § 86.57(c) because pregnancy is treated differently from other temporary medical disabilities. HEW requested that the school board adopt a plan providing for appropriate corrective action. None of the school boards adopted such curative procedures or otherwise changed its employment practices. The Office of Civil Rights then notified each school board that it was referring the matter to the appropriate HEW office for enforcement action. The primary enforcement mechanism is termination of funding. In response to these developments, the various school boards instituted the present suits for declaratory and injunctive relief.

The Brunswick School Board action against the state defendants arises from a state statute, 20 M.R.S.A. § 3755, which requires the Commissioner to "insure" that federal or state funds distributed to school boards by the Maine Department of Educational and Cultural Services are spent "in compliance with" a number of federal and state laws, including Title IX and 45 C.F.R., Part 86.[2] Each school board which receives

[2] 20 M.R.S.A. § 3755 provides in pertinent part:

> The commissioner shall insure that any federal or state funds distributed to any school administrative unit are spent in compliance with:

funds from the Department is required to complete an Assurance of Compliance form stating that the particular school board is acting in compliance with the spending provisions set forth in § 3755. The Commissioner is empowered to withhold aid to a school board which fails to provide adequate assurance of compliance. 20 M.R. S.A. § 6.[3] To date Brunswick neither has returned a completed Assurance of Compliance form to the Department nor otherwise has assured the Department that its policies are in accord with the requirements of § 3755.

II.

Section 901 of Title IX prohibits sex discrimination in federally funded education programs. It provides in pertinent part:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . .

Section 902 of Title IX, 20 U.S.C. § 1682, grants the appropriate federal department or agency the authority to promulgate rules and regulations to implement § 901. Section 902 additionally provides that compliance with such rules and regulations may be effected through termination of federal educational funding or by any

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2. *Education amendments.* Title 9 of the Education Amendments of 1972, 20 U.S.C. § 1681 et seq., and Part 86 of Title 45 of the Code of Federal Regulations. . . .

[3]20 M.R.S.A. § 6 provides in pertinent part:

> 1A. The commissioner is authorized to withhold state aid from an administrative unit in order to assure compliance with reporting requirements prescribed under this Title.

other means authorized by law. Section 902 states in pertinent part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law. . . .

Pursuant to § 902, HEW issued final regulations to implement Title IX, 45 C.F.R., Part 86, which became effective on July 21, 1975. Subpart E of these regulations, 45 C.F.R. §§ 86.51–86.61, regulates the conduct of Title IX schools toward their employees. 45 C.F.R. § 86.57(c), the regulation here challenged, states in pertinent part:

> (c) *Pregnancy as a temporary disability.* A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery

therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

III.

A.

The inquiry must begin with analysis of the language of the statute. Section 901 in terms addresses itself only to sex discrimination against the participants in and the beneficiaries of federally funded education programs. The clear, unconstrained import of the statutory language is that § 901 is designed to protect from sex discrimination those persons for whose benefit the federally assisted education programs are established, that is, the students in those programs.[4] The teacher employees of plaintiff school boards are not the direct beneficiaries of such programs and consequently do not fall within the plain meaning of the language of § 901.

Defendants argue that the mandate of § 901 that "no person" shall be the subject of sex-based discrimination necessarily forbids sex discrimination against teachers as well as against students, because both teachers and students fall within the term "person." This proposed

[4] It is possible, of course, for the protected class to consist of faculty members if the faculty are the ultimate beneficiaries of the federally aided activity, such as when the federal assistance furnishes support for faculty research. *See Seattle University* v. *United States Department of Health, Education and Welfare*, No. C77-6315 (W.D. Wash. January 3, 1978), slip op. at 5. In the cases at bar, however, the teachers are not the direct beneficiaries of federal educational funding and defendants do not so contend.

interpretation, however, does violence to the specific wording of the statute and ignores the well established doctrine of statutory construction of *ejusdem generis:* where a general term is followed by specific words in an enumeration describing a legal subject, the general term is construed to embrace only persons or objects similar in nature to those described by the specific words. *See* 2A Sutherland, *Statutes and Statutory Construction* § 47.14 (4th ed., C. Sands 1973). Here, the specific words of § 901 unmistakably delineate the direct beneficiaries of or participants in federally aided education programs as those whom the statute seeks to protect. The more general words contained in the statute must be construed as comprehending only persons similar to this specifically described class of individuals.

The foregoing reading of § 901 is reinforced by examination of the list of coverage exclusions set forth in § 901 itself, all of which relate to student activities or enrollment policies. Section 901(a)(1)—(9), 20 U.S.C. § 1681(a)(1)-(9). Thus, for example, § 901(a)(1) excludes coverage of admissions to vocational and higher educational institutions; § 901(a)(2) excludes coverage of admissions to educational institutions in the process of changing from a one-sex to a two-sex admissions policy; § 901(a)(5) excludes coverage of admissions to public institutions of undergraduate higher education which have traditionally admitted only students of one sex; § 901(a)(6)(A) excludes coverage of the membership practices of student fraternities and sororities; § 901(a)(6)(B) excludes coverage of the membership practices of the YMCA, the YWCA, the Girl Scouts, the Boy Scouts, the Camp Fire Girls, and other youth service organizations which have traditionally limited their membership to persons of one sex; § 901(a)(8) excludes coverage of father-son or mother-daughter activities. Not one of these statutory exclusions pertains to an educational institution's employment practices. It is highly unlikely that, if Congress had intended to include employment practices within the coverage of §

901, it would not have excluded from coverage faculty employment practices of educational institutions analogous to those institutions whose student admissions policies are presently exempted from coverage. *Cf.* 42 U.S.C. § 2000e–1. The failure of Congress to do so is persuasive indication that § 901 was not intended to regulate employment practices.

As the court in *Romeo Community Schools* v. *United States Department of Health, Education and Welfare*, 438 F.Supp. 1021 (E.D. Mich. 1977), *appeal docketed*, No. 6–71438 (6th Cir. May 18, 1977), succinctly noted, any reference to faculty employees in § 901 is "indirect, if not obscure. . . When Congress means to statutorily regulate employment discrimination, it uniformly does so in more explicit terms than this." *Id.* at 1031, 1032 (footnote omitted). Defendants' construction of § 901 simply is not supported by the wording of the statute.

B.

Although not without some ambiguity, the legislative history of Title IX supports the limited construction suggested by the language of § 901—that Congress did not intend in enacting § 901 to authorize HEW to regulate the employment practices of federally funded educational institutions. Title IX was patterned on Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*, which forbids race discrimination in all federally funded programs, and most of the provisions of Title IX closely parallel the provisions of Title VI.[5] Thus, § 901 of Title IX is nearly identical to § 601 of Title VI, 42

[5] Indeed, the first House version of title IX was a simple amendment to Title VI adding sex discrimination to the prohibition of race discrimination in Title VI. *See* H.R. 16098, 91st Cong., 2d Sess. (1970).

U.S.C. § 2000d,[6] and § 902 of Title IX is a carbon copy of § 602 of Title VI, 42 U.S.C. § 2000d–1. The legislative history of Title IX demonstrates that Congress intended the Title IX language to have same meaning as the similar Title VI language, and it is clear that § 601 of Title VI, upon which § 901 of Title IX is based, was not considered by Congress as covering race discrimination in employment. *See* Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 Geo.L.J. 49, 50–54 (1976), and the legislative history of Title VI there cited.

There is, however, one major difference between Title VI and Title IX, which defendants emphasize. Title VI contains a section explicitly exempting discrimination in employment from its coverage. Section 604 of Title VI, 42 U.S.C. § 2000d–3 provides:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Title IX contains no similar provision, and defendants argue that the absence of such a provision in Title IX is persuasive of the intent of Congress not to exclude sex discrimination in employment from the coverage of § 901. In further support of their position, defendants rely on the remarks of Senator Bayh made in 1972 during the congressional debates over the bill containing

[6] Section 601 of Title VI provides:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Title IX as showing a congressional intent to regulate employment practices under § 901. Senator Bayh, a sponsor of the bill, stated,

> Amendment 874 [an amendment to the Education Amendments Bill of 1972 which, among other provisions, contained § 901] is broad, but basically it closes loopholes in existing legislation relating to general education programs and employment resulting from those programs. . . .More specifically, the heart of this amendment is a provision banning sex discrimination in educational programs receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment, with limited exceptions.

118 Cong. Rec. 5803 (daily ed. February 28, 1972). Defendants also point to Senator Bayh's synopsis of Title IX, which he included in the Congressional Record at the end of his remarks. *Id.* at 5807. Defendants argue that Senator Bayh's comments and similar observations made by him and Representative Patsy Mink three years later, at the time Congress reviewed the Title IX regulations here in issue[7] demonstrate the broad reach which Congress intended § 901 to possess.

Defendants' arguments are not persuasive. The legislative background clearly shows that the failure of Congress to include in Title IX a provision similar to § 604 of Title VI, excluding employment discrimination from its coverage, does not indicate a congressional intent that the scope of § 901 be broader than that of § 601 in this respect. Title IX was a comprehensive legislative scheme which, in addition to § 901, also included both an amendment to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, extend-

[7] *See* Hearings before the Subcommittee on Secondary Education, Committee on Education and Labor, 94th Cong., 1st Sess., at 164, 171 (June 23, 1975).

ing the coverage of Title VII to previously exempted educational institutions, and an amendment to the Equal Pay Act of 1963, 29 U.S.C. § 206(d), expanding that Act to include within its purview employees of educational institutions. Title IX thus contained, in addition to § 901, provisions dealing directly and specifically with sex discrimination in educational employment.[8] A provision similar to § 604 of Title VI, excluding employment discrimination from the coverage of Title IX, surely would have contradicted these specific employment provisions in Title IX. Thus, although an earlier version of Title IX had, in fact, contained a provision identical to § 604, its deletion, because of the conflict it would have created with Title IX's employment provisions, cannot properly be interpreted as probative of a congressional intent to bring employment practices within the scope of § 901. *See* Kuhn, *supra* at 58–58.[9]

Nor do Senator Bayh's remarks support defendants' position. Amendment 874, to which Senator Bayh referred, was the original draft of Title IX, which included both § 901 and the Title VII and Equal Pay Act amendments. It is apparent that his remarks, as well as his synopsis of Title IX, insofar as they pertained to employment discrimination, can only reasonably be understood as alluding to the Title VII and Equal Pay Act amendments, and not to § 901.

[8] The Title VII amendment eventually was deleted from the final version of the Education Amendments of 1972, because an identical amendment to Title VII had been included in the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. § 2000e *et seq.* (Supp. 4, 1974), which the President signed into law shortly before Congress passed the education bill. *See* Kuhn, *supra* at 60–61.

[9] The Title IX provision corresponding to § 604 of Title VI was deleted in committee conference. The Conference Report does not discuss the reason for the deletion. See Conference Report No. 798, 92d Cong., 2d Sess., 1972 U.S. Code Cong. & Admin. News, pp. 2608, 2671–72.

Defendants also attempt to make much of the fact that Congress did not disapprove the regulation here at issue when it had the opportunity to do so prior to the final promulgation of the Title IX regulations in 1975. Defendants interpret this congressional action, or lack thereof, as demonstrative of congressional sentiment that the regulation accurately reflects the meaning of § 901. Congress, however, by statute has expressly stated that the failure of Congress to adopt a resolution disapproving of HEW regulations issued in conjunction with any federal legislation dealing with education should not have such an effect. 20 U.S.C. § 1232(d)(1), an amendment to the General Education Provisions Act, provides in part:

> Failure of the Congress to adopt such a concurrent resolution with respect to any such final regulation prescribed under any such Act, shall not represent . . . an approval or finding of consistency with the Act from which it derives its authority for any purpose, nor shall such failure to adopt a concurrent resolution be construed as evidence of an approval or finding of consistency necessary to establish a prima facie case, or an inference or presumption, in any judicial proceeding.

In sum, the legislative history of Title IX, like the text of § 901, demonstrates that § 901 is not directed at sex discrimination in employment. It is apparent that in enacting Title IX Congress had two principal purposes: (1) the protection of students against sex discrimination in federally assisted education programs, with enforcement by HEW, as provided in §§ 901 and 902; and (2) the protection of employees in educational institutions against sex discrimination, with enforcement by the Equal Employment Opportunity Commission and the Department of Labor, as provided in the Title VII and Equal Pay Act amendments.

C.

The two federal courts which have directly addressed the question have both concluded that § 901 only reaches sex discrimination among the beneficiaries of federally aided education programs and does not cover discriminatory employment practices. *Romeo Community Schools* v. *Department of Health, Education and Welfare, supra; Seattle University* v. *Department of Health, Education and Welfare, supra.* The *Seattle University* litigation stemmed from a charge that the University had discriminated on the basis of sex in the award of faculty salaries. *Romeo Community Schools* dealt specifically with pregnancy disability benefits and the authority of HEW to promulgate 45 C.F.R. § 86.57(c). The court in *Seattle University* entered a declaratory judgment that the Title IX employment regulations, 45 C.F.R., Subpart E, §§ 86.51–86.61, were void and of no effect because they exceeded the authority delegated to HEW under Title IX. The court granted appropriate injunctive relief. The final judgment entered in *Romeo Community Schools* was comparable to that in *Seattle University*, but was restricted to a declaration that 45 C.F.R. § 86.57(c) was invalid, since the court determined that the plaintiff school district possessed standing only to challenge that section. *See* order of Feikens, J., so modifying the reported opinion, Civil Action No. 6–71438 (E.D.Mich. May 18, 1977). The arguments raised and considered in *Seattle University and Romeo Community Schools* were similar or identical to those presented in the instant cases. In each case the court reviewed the statutory language and legislative history of § 901 and concluded that § 901 prohibits only sex discrimination by federally funded educational institutions against their students and does not cover the employment practices of such institutions.

Defendants place considerable reliance upon *Piascik* v. *Cleveland Museum of Art*, 426 F.Supp. 779 (W.D.Ohio 1970), in which the court found an implied

private right of action for sex-based employment discrimination under § 901. *Id.* at 780–81 n.1. The *Piascik* court, however, held that the plaintiff, a woman who had applied for and had been denied a position as a security guard with defendant, had not been denied employment because of her sex. A reading of *Piascik* reveals that questions concerning the scope of § 901 were not the focus of the action, the applicability of § 901 to the alleged discrimination apparently was not contested, and to the extent that the court addressed the issue presented by the instant cases, it was disposed of in only a brief, conclusory manner. *Idem.*[10]

Defendants also rely on *United States* v. *City of Chicago*, 395 F. Supp. 329 (N.D.Ill.), *aff'd*, 525 F.2d 695 (7th Cir. 1975). *City of Chicago* held that § 122(a) of the State and Local Financial Assistance Act of 1972, 31 U.S.C. § 1242(a) (the Revenue Sharing Act), the language of which closely resembles § 901 of Title IX, barred employment discrimination by recipients of federal revenue sharing funds. *City of Chicago*, however, is distinguishable, since both the statutory context and legislative history of § 122(a) differ from that of § 901. Unlike § 901, § 122(a) does not include an extensive list of exclusions from its coverage which shed light on its meaning. Nor was § 122(a) enacted as part of a comprehensive remedial legislative package which also included provisions specifically addressing employment discrimination.

Scant as it may be, the case law thus leads to the same conclusion as do the textual analysis and the

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[10]The issue of whether Title IX implies a private cause of action for employment discrimination on the basis of sex likewise was raised in *McCarthy* v. *Burkholder*, 15 E.P.D. ¶ 7926 (D. Kan.1977), *modified on reconsideration*, 448 F.Supp. 41, (D.Kan. Feb. 2, 1978). The court originally had determined that Title IX implied such a private remedy but subsequently modified its order and dismissed plaintiff's Title IX claim in large part because of the intervening opinion in *Romeo Community Schools*, *supra*. *McCarthy*, *supra*, slip op. 4–6.

legislative history of § 901: the statute does not cover the employment practices of educational institutions receiving federal funds, but rather is restricted in scope to a prohibition of sex discrimination against students and other direct beneficiaries of such federal assistance.

D.

As an alternative argument, defendants contend that § 901 reaches employment discrimination in those situations where employment discrimination has an adverse effect on students or other beneficiaries of federal funding. Employment discrimination under these circumstances is said to "infect" the students. Defendants derive this position from cases which have held that Title VI of the Civil Rights Act of 1964 reaches racial discrimination in employment when such discrimination results in discrimination against students. *See, e.g.*, *Board of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068, 1078 (5th Cir. 1969); *United States* v. *Jefferson County Board of Education*, 372 F.2d 836, 893 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385, *cert. denied*, 389 U.S. 840, 88 S.Ct. 67, 19 L.Ed.2d 103 (1967).

Defendants' reliance on this line of cases is misplaced. Defendants do not here claim that plaintiffs' pregnancy leave policies ultimately have a discriminatory effect on students. Moreover, no reasonable reading of 45 C.F.R. § 86.57(c) can limit its coverage to instances of discriminatory infection. Assuming *arguendo* the infection theory to be valid, the HEW regulation here challenged nevertheless is void because it comprises a general regulation of employment practices per se and is not limited to those situations in which employment discrimination results in discrimination against students or other program beneficiaries. *Romeo Community Schools* v. *Department of Health, Education and Welfare*, *supra* at 1035; *Seattle University* v. *Department of Health, Education and Welfare*, *supra*, slip op. at 9–10.

IV.

In addition to the contentions advanced by the federal defendants in support of their challenge to 45 C.F.R. § 86.57(c), the state defendants submit two arguments peculiar to Brunswick's suit against them.

First, the state defendants insist that, with respect to them, Brunswick's claim is not yet ripe for adjudication, because no formal finding has been made that Brunswick is in violation of 20 M.R.S.A. § 3755, and because no state enforcement procedures have been commenced against Brunswick. The Court finds this argument unpersuasive.

The basic test for determining ripeness involves an examination of whether "there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality" to warrant a judicial decision. *Lake Carriers Association* v. *MacMullen*, 406 U.S. 498, 506, 92 S.Ct. 1749, 1755, 32 L.Ed.2d 257 (1972); see *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148–56, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); *Toilet Goods Association* v. *Gardner*, 387 U.S. 158, 162, 87 S.Ct. 1520, 18 L.Ed.2d 697 (1967). Applying this test, the propriety of judicial resolution of the question here presented is manifest. The facts are undisputed; the matter before the Court is of a strictly legal nature. HEW already has concluded that Brunswick's pregnancy leave policy treats pregnancy differently from other temporary medical disabilities. Brunswick's policy clearly runs contrary to 45 C.F.R. § 86.57(c), and Brunswick so far has refused to assure the Commissioner that it will revise its employment practices to comport with the requirements of the regulation. Brunswick's interest in not having to comply with 45 C.F.R. § 86.–57(c) is substantially adverse to that of the state defendants, whose mandate under 20 M.R.S.A. § 3755 is to insure that Brunswick and similarly situated school boards are acting in accord with the regulation. The fact that the State has not instituted enforcement action does not detract from the immediacy and reality of the controversy between the parties. If to qualify for the federal and state aid distributed by the Department of Educational and Cultural Services Brunswick needs to satisfy the terms of 45 C.F.R. § 86.57(c), it is evident that Brunswick will be required to effect prompt, far-reaching, and costly changes in its employment and fiscal policies. There exists a concrete controversy between the parties which is ripe for judicial determination.

The state defendants' second argument is equally without merit. It is that 20 M.R.S.A § 3755 incorporates as the law of the State of Maine the regulations set forth in 45 C.F.R., Part 86 as they existed on the date the Maine statute became effective, regardless of their continued viability as federal regulations. This patently irrational construction of 20 M.R.S.A. § 3755 is not supported by the wording of the statute, nor have the state defendants introduced any legislative history or other authority which would indicate that the Maine Legislature intended the Commissioner to enforce an invalid federal regulation. The obvious purpose of § 3755 is to assure that state education policy reflects the public policy embodied in the applicable federal and state statutes and regulations. Were the state defendant's proposed interpretation of § 3755 to prevail, the statute quickly would become outmoded as the federal and state regulations cited therein underwent the customary process of change and modification. Section 3755 cannot reasonably be construed to incorporate those regulations contained in 45 C.F.R., Part 86 which have been superseded or amended or, which, as in the present instance, have been found to be invalid and no longer to be given legal force and effect.

V.

The Court holds that § 901 of Title IX is limited to a prohibition of sex discrimination against students and

other direct beneficiaries of federal educational assistance funds and does not cover the employment practices of educational institutions receiving such funds. Accordingly, HEW had no power to promulgate 45 C.F.R. § 86.57(c).

* * * * * *

Plaintiffs' motions for summary judgment are granted; defendants' cross-motions for summary judgment or, in the alternative, to dismiss are denied; and judgment will be entered declaring 45 C.F.R. § 86.57(c) invalid and of no legal force and effect and enjoining defendants from commencing or maintaining any proceedings to withhold federal or state financial assistance from plaintiffs for noncompliance with 45 C.F.R. § 86.57(c).[11] Plaintiffs may submit proposed forms of judgment, with notice to defendants, within ten days. Defendants may present their comments thereon within five days thereafter.

IT IS SO ORDERED.

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[11] The propriety of granting injunctive relief is without question. Should defendants proceed with enforcement action, plaintiffs will suffer immediate and irreparable injury, including but not limited to the possible termination of their federal and state funding, the corresponding harm to the towns, citizens and students which they serve, loss of public confidence in the school systems they operate, and the inability to engage competently in long-term fiscal planning.

No. 79-200

In the Supreme Court of the United States

OCTOBER TERM 1978

PATRICIA R. HARRIS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, ET AL., PETITIONERS

v.

ISLESBORO SCHOOL COMMITTEE, ET AL., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Islesboro School Committee, Board of Directors of Maine School Administrative District No. 5, Board of Directors of Maine School Administrative District No. 33, Winslow School Committee and Brunswick School Board (hereinafter "the Respondents") hereby oppose the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the First Circuit (hereinafter "the Petition") filed by Patricia R. Harris, Secretary of Health, Education and Welfare (HEW) and the other federal parties to this action ("the Petitioners").

QUESTIONS PRESENTED

1. Whether a sufficient case or controversy continues to exist between the parties.

2. Whether the HEW regulation codified in 45 C.F.R. §86.57(c) is valid.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

In addition to the statutes and regulations set forth in the Petition, the following constitutional provisions and statutes are involved.

1. Tenth Amendment, United States Constitution:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

2. Title VII of the Civil Rights Act of 1964, §701(k), 42 U.S.C. §2000e(k):

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. . . .

3. Title 5, Maine Revised Statutes Annotated §4572-A, P.L. 1979, c. 79, 1979 Me. Legis. Serv. 266:

> **Unlawful employment discrimination on the basis of sex.**

1. **Sex defined.** For the purpose of this Act, the word "sex" includes pregnancy and medical conditions which result from pregnancy.

2. **Pregnant women who are able to work.** It shall be unlawful employment discrimination in violation of this Act, except where based on a bona fide occupational qualification, for an employer, employment agency or labor organization to treat a pregnant woman who is able to work in a different manner from other persons who are able to work.

3. **Pregnant women who are not able to work.** It shall also be unlawful employment discrimination in violation of this Act, except where based on a bona fide occupational qualification, for an employer, employment agency or labor organization to treat a pregnant woman who is not able to work because of a disability or illness resulting from pregnancy, or from medical conditions which result from pregnancy, in a different manner from other employees who are not able to work because of other disabilities or illnesses.

4. **Employer not responsible for additional benefits.** Nothing in this section shall be construed to mean that an employer, employment agency or labor organization is required to provide sick leave, a leave of absence, medical benefits or other benefits to a woman because of pregnancy or other medical conditions which result from pregnancy, if this employer, employment agency or labor organization does not also provide sick leaves, leaves of absence, medical benefits or other benefits for his other employees.

5. **Small business exception.** Notwithstanding the provisions of subsection 3, employers with 15 or less employees shall not be required to provide medical benefits because of pregnancy or other medical conditions which result from pregnancy.

4. Title 20 Maine Revised Statutes Annotated §1951 (Supp. 1978):

> **Minimum sick leave.**
>
> Each administrative unit operating public schools within the State shall grant all certified teachers, except substitute teachers as defined by the commissioner, a minimum annual sick leave of 10 school days accumulative to a minimum of 90 school days without loss of salary . . . . Full-time teachers assistants and teachers aides shall be granted minimum annual sick leave of 10 school days.

STATEMENT OF THE CASE

The Petitioners' Statement of the Case fails to mention several significant judicial and legislative developments that have occurred since the district court decision, which developments, as the court of appeals observed, have rendered the substantive question presented of "largely academic interest". *Islesboro School Committee v. Califano*, 593 F. 2d 424, 430 (1st Cir. 1979).

First, in August of 1978, the Maine Supreme Judicial Court held that pursuant to a state sick leave statute, 20 M.R.S.A §1951, disabilities resulting from pregnancy must be treated as any other temporary medical disability with respect to paid sick leave benefits. *Murray v. Waterville Board of Education*, 390 A. 2d 516 (Me. 1978). Moreover, on October 31, 1978, Congress amended Title VII of the Civil Rights Act of 1964 by adding a prohibition against the disparate treatment of pregnancy as a disability. P.L. No. 95-555, 92 Stat. 2076, 42 U.S.C. §2000e(k). Finally, subsequent to the court of appeals decision herein, the Maine Legislature amended the Maine Human Rights Act by adding a similar prohibition, which became effective on September 14, 1979. Title 5 M.R.S.A. §4572-A, P.L. 1979, c. 79, 1979 Me. Legis. Serv. 266.

As a result of these developments, the Respondents are obliged both as a matter of state and federal law to treat pregnancy

disabilities the same as other temporary disabilities for employment-related purposes without regard to the validity of 45 C.F.R. §86.57(c).

ARGUMENT

A. The Petition should be denied because there is no longer a sufficient case or controversy between the parties.

The controversy which gave rise to this case is now academic. As a result of the decision of the Maine Supreme Judicial Court in *Murray, supra,* and the recent amendments to Title VII of the Civil Rights Act of 1964 and to the Maine Human Rights Act, the Respondents have been required to alter their sick leave policies to eliminate any disparate treatment of pregnancy-related disabilities. The question of the validity of 45 C.F.R. §86.57(c) has, therefore, lost its vitality in the context of this case and is essentially moot. Under these circumstances, certiorari should be denied. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955); *Cook v. Hudson*, 429 U.S. 165 (1976).

The Petitioners' characterization of the Question Presented (Petition at 2) as the broader question of the authority of HEW to promulgate employment regulations generally under Title IX is plainly insufficient to create a live case or controversy because the facts involved in this action raised only the narrower question of the validity of the regulation promulgated in 45 C.F.R. §86.57(c). There is not now, nor has there ever been, a case or controversy between the parties as to any other employment regulation issued by HEW under Title IX.

B. The Petition should be denied because there is no conflict among the courts of appeals.

The three courts of appeals which have ruled on the question have uniformly concluded that Sections 901(a) and 902 of the Education Amendments of 1972, 20 U.S.C. §§1681(a) and 1682, do not authorize HEW to promulgate regulations pertaining to the employment practices of school districts and educational institutions receiving federal funds. *Islesboro School Committee*

v. Califano, 593 F. 2d 424 (1st Cir. 1979), *aff'g* 449 F.Supp. 866 (D.Me. 1978), *pet'n for cert. pending*, 48 U.S.L.W. 3118 (U.S. Aug. 28, 1979) (No. 79-200); *Junior College District of St. Louis v. Califano*, 597 F.2d 119 (8th Cir. 1979), *aff'g* 455 F.Supp. 1212 (E.D. Mo. 1978), *pet'n for cert. pending*, 48 U.S.L.W. 3118 (U.S. Aug. 28, 1979) (No. 79-201); *Romeo Community Schools v. HEW*, Nos. 77-1691, 77-1692 (6th Cir. June 20, 1979), *aff'g* 438 F.Supp. 1021 (E.D. Mich. 1977).[1] In view of the fact that the decision of the court of appeals below is consistent with the decisions of all the federal courts that have ruled on the question of the validity of HEW's Title IX employment regulations, there is no conflict presented for resolution by the Court, and the Petition should, therefore, be denied.

C. The Petition should be denied because the question of the validity of 45 C.F.R. §86.57(c) is not an issue of such importance as to justify review by the Supreme Court.

Petitioners argue that notwithstanding the uniformity of federal court decisions, this case presents an important question of federal law justifying certiorari because those decisions have "disrupted" HEW's Title IX enforcement program. (Petition at 11). For several reasons, the "disruption" alluded to in the Petition is insufficient to warrant Supreme Court review of this case.

First, in view of the recent amendment to Title VII of the Civil Rights Act of 1964, a federal remedy is now available for

[1]Moreover, all of the district courts' decisions are in accord. In addition to the district court decisions in *Islesboro, Junior College District* and *Romeo, supra, see Seattle Univ. v. HEW*, No. C-77-631S (W.D. Wash. Jan. 20, 1978), *appeal pending*, No. 78-1746 (9th Cir.); *Dougherty County School System v. Califano*, C.A. No. 78-30-ALB (M.D. Ga. Aug. 22, 1978), *appeal pending*, No. 78-3384 (5th Cir.); *Board of Educ. of the Bowling Green City School Dist. v. HEW*, No. C-78-177 (N.D. Ohio March 14, 1979), *appeal pending*, No. 79-3420 (6th Cir.); *University of Toledo v. HEW*, 464 F. Supp. 693 (N.D. Ohio 1979), *appeal pending*, No. 79-3270 (6th Cir.); *North Haven Bd. of Educ. v. Califano*, Civ. No. N-78-165 (D. Conn. Apr. 26, 1979); *Auburn School Dist. v. HEW*, No. 78-154-D (D. N.H. May 14, 1979), *appeal pending*, No. 79-1261 (1st Cir.).

employee claims of disparate treatment of pregnancy-related disabilities.

Second, the disruption alleged by the Petitioners will as readily be resolved by the Court's denial of the Petition as by the grant thereof.

Third, since Petitioners indicate that over 55% of Title IX complaints involve employment (Petition at 11), the invalidation of HEW's Title IX employment regulations would seem to leave HEW more resources to devote to the complaints initiated on behalf of the clearly intended beneficiaries of Title IX – the students.

Finally, all of the arguments on the merits raised in the Petition have been specifically addressed, thoroughly considered and appropriately rejected by the numerous federal courts that have addressed the question presented by the Petition.

D. The Petition should be denied because regardless of whether Title IX authorizes HEW to regulate employment practices generally, the regulation codified in 45 C.F.R. §86.57(c) is invalid on other grounds.

1. The denial of paid sick leave benefits for pregnancy-related disabilities does not constitute discrimination "on the basis of sex" under Title IX.

In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court held that the denial of paid sick leave benefits for pregnancy-related disabilities did not constitute discrimination "because of. . .sex" under Title VII of the Civil Rights Act of 1964.[2] *See also Richmond Unified School District v. Berg*, 434 U.S. 158 (1977); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). For the same reasons as those stated by the Court in *Gilbert*, Title IX of the Education Amendments of 1972, which prohibits discrimination "on the basis of sex", does not cover pregnancy. While Title VII of the Civil Rights Act of 1964 was

[2]42 U.S.C. §2000e-2(a) (1).

recently amended to include "pregnancy" within the terms "because of sex" or "on the basis of sex", no such amendment has been made to Title IX. Accordingly, because the denial of paid sick leave benefits does not constitute discrimination "on the basis of sex" under Title IX, HEW lacked authority to promulgate the regulation codified in 45 C.F.R. §86.57 (c).

2. The Tenth Amendment to the United States Constitution stands as a bar against federal regulations that dictate sick leave policies of local school boards where Section 5 of the Fourteenth Amendment is not the source of authority for such regulations.

Because the denial of disability benefits for pregnancy does not constitute discrimination on the basis of sex sufficient to give rise to an equal protection claim under the Fourteenth Amendment, *Geduldig v. Aiello*, 417 U.S. 484 (1974), the underpinning for a federal regulation that would require a local school board to make such payments to its employees must be based on some other constitutional grant of Congressional authority. The Commerce Clause, U.S. CONST. art. I, §8, cl. 3, does not authorize such a regulation. *See National League of Cities v. Usery*, 426 U.S. 833 (1976). Nor does the Spending Power, U.S. CONST. art. I, §8, cl. 1, authorize such a regulation, for that power may not be construed to authorize Congress or HEW indirectly to subvert the principles of federalism inherent in the Tenth Amendment. Because Congress can erode the Tenth Amendment as effectively under the Spending Power as under the Commerce Clause, the limitations on the Commerce Power enunciated in *National League of Cities, supra,* would likewise be applicable to the Spending Power at least in situations where, as here, the Fourteenth Amendment is not the ultimate source of authority for the regulation in question.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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